

DOCKET NUMBER WD70031
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: January 19, 2010

PENN-STAR INSURANCE CO., RESPONDENT,

v.

JACOB GRIFFEY, APPELLANT.

Appeal From:
JACKSON COUNTY CIRCUIT COURT
THE HONORABLE JOHN M. TORRENCE, JUDGE

Appellate Judges:
Division One: Alok Ahuja, P.J., James M. Smart, Jr., and Lisa White Hardwick, JJ.

Attorneys:
Bruce B. Brown, Kearney, MO, **for appellant.**

Michael Hufft, Kansas City, MO, **for respondent.**

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

PENN-STAR INSURANCE CO., RESPONDENT

v.

JACOB GRIFFEY, APPELLANT

WD70031

JACKSON COUNTY CIRCUIT COURT

Jacob Griffey sued BJB Liberty, LLC, for injuries he sustained after a bouncer removed him from the premises of The Pub House, a bar owned by BJB Liberty. Griffey's petition described the bouncer's actions, alleged that the bouncer was negligent, and claimed that the bouncer's negligence caused his injuries. It did not allege an assault or battery nor indicate that the bouncer intended to cause harm. BJB Liberty sent the petition to its insurance carrier, Penn-Star Insurance Company, demanded a defense, and agreed to accept a reservation of rights. Penn-Star advised that it would not defend the claim because there was no coverage under the policy. Penn-Star filed a separate action seeking a declaration that there was no coverage based on exclusions for an "expected or intended injury" and for injuries from an "assault and battery or physical altercation."

BJB Liberty and Griffey agreed to limit recovery to the available amount of liability insurance. Following a hearing, the circuit court entered judgment for Griffey. It found that the bouncer was negligent in holding Griffey in such a manner that he was rendered unconscious and in failing to realize that Griffey was unconscious when placing him on the sidewalk, thereby allowing him to fall and strike his head. The court assessed damages of \$200,000.

At the declaratory judgment hearing, the evidence consisted primarily of the record from the personal injury trial. That court entered judgment in favor of Penn-Star. It found, essentially, that the bouncer's act of removing Griffey from the bar was an assault and battery and that Griffey's injuries resulted from that assault and battery were, therefore, excluded from coverage. Griffey appeals.

REVERSED AND REMANDED.

Division One holds: Analysis of the duty to defend depends upon the allegations in the petition and the other known or ascertainable facts. Because the petition did not purport to assert that the bouncer's removal of Griffey from the bar was an "assault and battery" nor describe a "physical altercation" so as to exclude coverage, and because Penn-Star did not show that it had any information demonstrating that there had been an assault and battery or physical altercation, Penn-Star had a duty to defend. Furthermore, because there was no evidence presented either at the personal injury trial or at the declaratory

judgment hearing demonstrating that Griffey's injury arose from an assault and battery or physical altercation, Penn-Star also had the duty to indemnify. The judgment is reversed, and the case is remanded for further proceedings.

Opinion by: James M. Smart, Jr., Judge

January 19, 2010

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